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Manl-ID: MAOPP1 MANUAL OF ADMIN OPERATIONS AND PROCEDURES PART 1

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SECTION 13. DISCIPLINARY MATTERS

13-1 INTRODUCTION (See MAOP, Part 1, 1-4 (5), 1-15.2, 1-23, 5-4.6, 10-6, 12-1.5 (1) (e), 12-2.5.2, 15-3.2 (4), 21-2 (4); MIOG, Part 1, 62-1.1 (6), 62-1.3.1 (2).)

(1) As the government's primary investigative service with a wide range of jurisdictional responsibilities for which we are accountable to the public, it is imperative that a policy of tight discipline be applied in the FBI. It is the responsibility of Bureau supervisory personnel to make clear to employees under their supervision that the Bureau's disciplinary program is firm but fair.

(2) It is imperative that any information pertaining to allegations of misconduct or improper performance of duty coming to the attention of any Bureau employee be promptly and fully reported to FBIHQ, and it is the continuing responsibility of Bureau officials to see to it that the employees under their supervision are properly indoctrinated regarding this requirement so that they not only will fully understand it but will comply with it.

(3) The appropriate Assistant Director, SAC or Legal Attache is authorized to temporarily assign personnel to other duties during an administrative inquiry if the circumstances surrounding the allegation indicate that such action is warranted. Such a reassignment should not be made automatically. Rather, each case must be judged on the individual factors involved, including the credibility of the allegation and the sensitivity of the employee's current assignment. Temporary reassignments may be justified in order to enhance the security and/or protect the integrity of FBI investigations and files; to preserve order; for the safety of persons and property; or for other appropriate reasons. Any such action must be coordinated with the Office of Professional Responsibility; Administrative Services Division; and the appropriate substantive FBIHQ division and be fully supported by the facts. If an employee is temporarily reassigned during an administrative inquiry, Assistant Directors, SACs and Legal Attaches must continually monitor developments in the administrative inquiry in order to assess the employee's position. If, for example, facts are later developed which alter the basis for the employee's original reassignment, then he/she may be returned to previous duties, even prior to a final adjudication of the matter. Allegations regarding unauthorized access or attempted unauthorized access to national security information should continue to be promptly reported to the Security Programs Manager, FBIHQ (see MIOG, Part 2, 26-4).

(4) See Part 1, Section 1, of this manual regarding Activities and Standards of Conduct of employees.

(5) No statements in this section are to be construed so as to indicate that nonpreference eligible FBI employees in the excepted service have a property interest in their employment such as in the form of an expectation of continued employment with the FBI. (See MAOP, Part 1, 14-4.2(4) & 21-1.)

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13-2 NOTIFICATION OF FBIHQ UPON RECEIPT OF ALLEGATIONS OF MISCONDUCT OR IMPROPER PERFORMANCE OF DUTY (See MAOP, Part 1, 13-13 (1) & (3) & 14-4.2; MIOG, Part 1, 263-2 (1).)

(1) All allegations of employee misconduct must be reported to the Adjudication Unit, Office of Professional Responsibility (OPR). Allegations of criminality or serious misconduct must be reported simultaneously to the OPR. OPR supervises and/or investigates all allegations of criminality or serious misconduct on the part of FBI employees. Judicial criticism of an Agent's conduct in findings of fact, opinions, or court orders, whether oral or written, is to be considered an allegation of serious misconduct and reported to OPR as set forth below. (See MAOP, Part 1, 1-23(2).)

(2) When an allegation is received concerning criminality or serious misconduct, the appropriate Assistant Director, SAC or Legal Attache will advise OPR of the allegation by telephone or teletype. OPR will, in turn, advise Adjudication Unit, OPR. A confirming electronic communication (EC), with a copy designated for the Adjudication Unit, OPR, should be directed, in a sealed envelope, to FBIHQ, Attention: OPR. OPR will then determine and advise who will conduct the investigation. In most instances, the Assistant Directors, SACs, or Legal Attaches will personally supervise and promptly investigate the vast majority of these matters. OPR normally investigates only those allegations involving FBIHQ officials, SACs, ASACs, and Legal Attaches and sometimes Headquarters and field supervisors or when circumstances dictate.

(3) If an allegation of misconduct within the responsibility of OPR arises out of a substantive case (pending or closed), the responsible FBIHQ Division will, more than likely, continue to supervise that investigation including the new allegation. However, FBIHQ divisions will immediately inform OPR of the alleged improprieties and forward that portion of the investigation to OPR, for further processing. These allegations should be carried under the "Office of Professional Responsibility (OPR) Matter" caption and handled as a separate "263" classification investigation so that the substantive investigation and/or prosecution is not hindered.

(4) Other infractions, such as those involving minor personal misconduct are well defined and will continue to be handled by OPR except for the following offenses which have been delegated to SACs and Assistant Directors for handling: Absent Without Leave (AWOL); Violations of Availability Regulations; Sleeping on Duty; Loss of Government Property; Miscellaneous Traffic Violations; Disruption of Office; Abusive/Offensive Language/Behavior in Workplace; and Verbal Altercations. SACs and Assistant Directors are authorized to orally reprimand or censure employees under their supervision below the GS-14 level for the above-listed offenses. Recommendations for more severe disciplinary action must be submitted to the OPR for resolution. (See SAC Memorandum 11-90 dated April 20, 1990, for additional information regarding the handling of above-mentioned offenses.) Any question as to whether a matter is or is not within the responsibility of OPR must be referred to OPR for a determination in this regard. (See MAOP, Part 1, 13-13(1) & (3).)

13-3 INVESTIGATION (See MIOG, Part I, 263-3.)

(1) When investigation necessary to develop complete essential facts regarding any allegation against Bureau employees must be instituted promptly, and every logical lead which will establish

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the true facts should be completely run out unless such action might prejudice pending investigations or prosecutions in which event FBIHQ will weigh the facts, along with the recommendation of the division head.

(2) The record of the inquiry shall include the initial allegation; the investigative results; aggravating or mitigating circumstances; statement of specific charge(s) and the employee's answer(s) including defenses to the specific charge(s), if any.

(3) Requests to conduct audits of the computer systems activities of employees who are suspected of misconduct or improper performance of duty will be handled only with prior notification to FBIHQ. The term audit refers both to review and/or evaluation of prior transactions or activities of a user and procedures designed to monitor the ongoing activities of a user. The proper form for such a request is a formal written communication to FBIHQ with a request directed to the Information Resources Division's (IRD) Investigative Automation Support Section (IASS), to conduct the audit. In exigent circumstances, which dictate the need for immediate institution of an audit, requests may be made telephonically to ASU and/or OPR and subsequently confirmed in writing. In instances where telephonic requests are authorized, the level of authority is at the ASAC level or above in the field offices and at the Section Chief level or above at FBIHQ, with the exception of requests emanating from ASU or OPR. Telephonic requests for user activities audits made by ASU or OPR will be authorized at the Supervisory Special Agent level. (See MIOG, Part I, 263-3 (4).)

(4) Approval to conduct the audits will be made at the Section Chief level in IASS, based on the technical feasibility and resource constraints. If the audit cannot be conducted or if additional information is needed to formulate the audit, IASS will contact the requestor. The results of each audit conducted will be reported on an FD-302 and disseminated to ASU or OPR and the requestor, should it be different from ASU or OPR. The original FD-302 will be forwarded to the office of origin. In those instances where exigent circumstances dictate that the results of the audit be telephonically disseminated, the results will be disseminated by IRD to ASU or OPR and to the requestor, should it be different from ASU or OPR, and the telephonic response subsequently confirmed in writing to ASU or OPR and the requestor. (See MIOG, Part I, 263-3 (5).)

13-4 INTERVIEWS OF EMPLOYEES INVOLVED

(1) Interviews of employees involved in allegations of criminality or serious misconduct should be conducted at the earliest logical time and in a forthright manner. There should be no evasiveness on the part of the Bureau official conducting the interview.

(2) The employee should be fully and specifically advised of the allegations which have been made against him/her in order that he/she may have an opportunity to fully answer and respond to them. The employee must be entirely frank and cooperative in answering inquiries of an administrative nature. If allegations are possibly criminal in nature, the employee has the right to seek counsel in the same vein as any other individual (see 13-6).

(3) Such interviews must be complete and thorough with all pertinent information obtained and recorded so that all phases of the allegations may be resolved. The interviews must not be unduly

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protracted and should be held to a reasonable length by proper preparation and recognition of the purpose of the interviews.

(4) The inquiry shall not be complete until the specific allegations that may justify disciplinary action are made known to the employee who may be disciplined and the employee is afforded reasonable time to answer the specific allegations. The employee's answers, explanations, defenses, etc., should be recorded in the form of a signed, sworn statement which should specifically include the allegations made against the employee in an introductory paragraph. The statement is to be prepared following an in-depth interview of the employee by the division head or designated supervisory representative. The employee is not merely to be asked to give a written response to the allegations, but is to be interviewed in an interrogatory fashion, and a signed, sworn statement prepared from the results by the interviewing official. Since the statement represents that which the employee is willing to sign and swear to, he/she retains the right to make corrections or changes before doing so. If those changes or corrections differ materially from what the employee stated during interview, that fact and the nature of the statements should be separately recorded. Should there be any question on the part of the interviewing official as to whether a particular allegation (set of facts) might justify disciplinary action, he/she should contact OPR, Inspection Division, in order to resolve this prior to the interview so the employee will be ensured of an opportunity to appropriately respond.

(5) When interviewing employees during administrative inquiries to solicit information about themselves or about their own activities, the employee should be provided the Privacy Act notice described in MIOG, Part I, 190-5(2), explaining the purpose of the inquiry and how the information will be used.

(6) When interviewing employees, or others, to solicit information about the subject of an administrative inquiry, the person interviewed as a source should be provided, if appropriate, the opportunity to request an express promise of confidentiality, as described in MIOG, Part I, 190-7, and SAC Memorandum 51-77(C), dated 11/15/77, in order to protect the source's identity should the subject of the inquiry submit a Privacy Act request for access to records of the inquiry. The source should be cautioned that if a formal adverse personnel action is taken against the subject of the inquiry pursuant to Chapter 75 of the Civil Service Reform Act, the information furnished, along with the source's identity must, by law, be provided to the subject, if any information provided in that statement is used in whole or in part to support that personnel action. In addition, pursuant to certain administrative inquiries and possible judicial proceedings, it may be necessary to furnish the source's identity if any information provided in the source's statement is used in whole or in part to support a personnel action. The principles discussed in 13-6, infra, are also applicable to an interview of an employee regarding the actions of others, to the extent such answers might reveal criminal misconduct on the part of the employee being interviewed.

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13-4.1 Deleted (See *Security Policy Manual* at http://rmd.fbinet.fbi/ppu/manuals-desk/manuals_published_in_new_format.htm)

13-5 SIGNED SWORN STATEMENTS

Whenever there are circumstances in connection with investigations or inquiries indicating misconduct of personnel, harassment or intimidation of subjects, other individuals or groups, or derelictions of any kind by the Bureau, all Agents engaged in such investigations or inquiries must:

(1) Immediately prepare signed sworn statements of fact so that a clear record will be available should a question arise at a later date. These statements should:

- (a) Cover facts bearing directly upon charges made.
- (b) Be specific as to each allegation, if allegations are specific.
- (c) Be general in nature, if allegations are general in nature.

In matters relating to a pending investigation, no interviews should be conducted until it is determined by the USA's office, the Department of Justice and/or FBI Headquarters, that such action will not hinder the investigation and/or prosecution. The SAC or any Special Agent designated by SAC may administer the oath in these statements since, under existing regulations, Agents are authorized to administer oaths in cases involving irregularities or misconduct in office of a Government employee. This statement is comparable to an affidavit, but does not necessitate notarization.

(2) Forward the original and one copy of these statements to FBIHQ under the appropriate case caption and retain a copy in the field office or Headquarters file. If the allegations relate to a matter currently being investigated, prosecuted or on appeal, the USA's office (or in aggravated instances, Office of Professional Responsibility-Department of Justice) should be made aware and an opinion sought as to whether or not immediate preparation of the employee's statement would have a detrimental effect on the substantive investigation. Thereafter, if appropriate, a signed copy of any statement obtained can also be furnished to the appropriate USA so that the court records will clearly show the true facts and any false allegations made will not stand undisputed in the court record.

(3) If the matter, whether criminal or administrative in nature, is considered sufficiently serious, an attempt should be made to obtain the complainant's allegation in the form of an affidavit or sworn signed statement also.

13-6 ADMINISTRATIVE OR CRIMINAL PROCEEDINGS - USE OF INTERVIEW FORMS
(See MAOP, Part I, 13-4; MIOG, Part I, 263-5.)

(1) Prior to the interview of an employee against whom allegations of criminal misconduct have been leveled a decision should be made as to whether the goal of the interview is to obtain a statement admissible in subsequent criminal proceedings or whether the goal is to compel the employee to make a full statement of the facts in order to ascertain what administrative action, if any, is appropriate. This decision is to be made by OPR, FBIHQ.

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(2) To ensure that employees being interviewed are fully and consistently made aware of their rights and obligations, two forms have been adopted for use in such interviews. The Office of Professional Responsibility, DOJ, has fully endorsed the use of these forms. These forms are only to be utilized during OFFICIAL administrative inquiries and only when authorized by FBIHQ (primarily those supervised by OPR).

(3) Neither of these two forms (FD-644 nor FD-645) which are described below are to be routinely used during the investigation of a shooting incident. They will be used only in those shooting inquiries when instructed to do so by FBIHQ as set forth in MIOG, Part II, Section 12-11.7.

The decision as to which form will be used in a particular inquiry will be made by OPR, FBIHQ, on a case-by-case basis, in accordance with the principles set forth below.

13-6.1 Criminal Proceeding Contemplated or Possible

(1) Form A (FD-644) captioned "Warning and Assurance to Employee Requested to Provide Information on a Voluntary Basis," is to be utilized in situations where an employee is provided an opportunity to voluntarily respond to questions concerning allegations of job-related misconduct which have the potential for criminal prosecution, but wherein the employee is not being compelled to answer questions or provide a statement. Use of this form should assure that any statements obtained will be freely and voluntarily given and, hence, admissible in any future criminal proceeding.

(2) Full Miranda warnings will be given to employees only in situations where the employee to be interviewed is in custody or is significantly deprived of his/her freedom of action, an arrest is clearly intended at the conclusion of the interview, or whether in custody or not, the employee being interviewed has previously been arrested or formally charged and prosecution is pending on a Federal offense and the questioning concerns that offense or a related Federal offense.

(3) Whenever Form FD-644 is utilized, an interview log should be prepared in accordance with the Legal Handbook for Special Agents, Section 7-9.

13-6.2 Inquiry Solely for Administrative Purposes

(1) In a situation where the allegation, if true, has the potential for criminal prosecution, but a decision has been made not to seek an admissible statement, (but rather, to compel the employee to fully and candidly answer all questions concerning the alleged incident), Form B (FD-645), captioned "Warning and Assurance to Employee Required to Provide Information," should be used.

However, prior to the use of this form in any instance where the allegation, if true, would have potential for Federal criminal prosecution of the employee to be interviewed, OPR-Inspection Division must present the facts of the case to OPR-DOJ and obtain an initial opinion that the matter in question should be handled administratively rather than criminally. This is necessary because any incriminating statement obtained after use of Form FD-645 will not be admissible in a criminal prosecution of the employee.

(2) In a situation where the allegation, if true, has potential for non-Federal prosecution, and a decision has been made by FBIHQ to compel full answers from the employee regarding the matter under investigation, Form FD-645 should be used.

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- (3) In all other instances where an employee is being interviewed in connection with an official administrative inquiry, Form FD-645 should be used.
- (4) There is no Sixth Amendment right to counsel in purely administrative interviews. Therefore, even if the employee specifically requests to have an attorney present during the course of the interview, the Bureau is not legally obliged to agree to this condition. Any administrative decision to allow the presence of counsel during an administrative interview is to be made by OPR, FBIHQ.
- (5) An interview log is not required when Form FD-645 is utilized. Those conducting such administrative interviews of employees should be alert, however, to circumstances where good judgment might warrant preparation of an interview log; for example, in those interviews of a particularly sensitive nature or in those concerning serious misconduct involving veterans which may ultimately be heard before a Merit Systems Protection Board.

13-7 REPORTING

- (1) In most instances, after FBIHQ has been initially notified of the allegation, it will be satisfactory for the responsible official to report the facts pertaining to the misconduct or improper performance of duty, by letter setting forth a concise statement of the situation together with supporting documentation and statements. In all cases, whether or not it is felt administrative action is necessary, a statement that administrative action is, or is not, recommended must be made. There can be no deviation from this procedure.
- (2) To prevent unauthorized disclosure of these allegations and the subsequent inquiry, a separate field office file should be opened and indexed under a "263" classification for each investigation and be maintained in the SAC's safe. This file number will be included on all communications between field divisions and FBIHQ; communication being directed to the personal attention of the SAC and/or enclosed in a sealed envelope to FBIHQ, Attention: OPR-Inspection Division.
- (3) Copies of the allegations and subsequent investigation should not be placed in the accused's field office or FBIHQ personnel file. Only if some form of administrative action is taken will there be any need to address the allegation in one's personnel file. This is satisfactorily handled by a designated copy of the approved justification memorandum and/or addendum(s) being placed in the personnel file at FBIHQ as well as copies of the outgoing communication to the employee being placed in both the field office and FBIHQ personnel files.

13-7.1 Format

Certain factual situations may require the letters in which they are reported to exceed one page in length. In these instances, such letters should conform to the following format:

- (1) Title--This should, when possible, relate only to the substance of the allegation regardless whether or not it originated out of a substantive investigation or is work related. The title should include the employee(s) name; general allegation (i.e., alleged professional misconduct, etc.); complainant, if appropriate; division and classification, i.e., OPR Matter.
- (2) Synopsis--Here should be stated briefly, but clearly the pertinent facts relating to the situation. While brief, the synopsis should contain sufficient facts to give any reviewing official a clear picture of each allegation and whether they are true or false.

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(3) Action taken--Here should be clearly enumerated the action taken by the Bureau official pertaining to the employee in connection with the misconduct or improper performance of duty. For example, a statement as to the time and date an employee was suspended from active duty, or an explanation as to any investigation or information sought from other field offices in running out the allegation, or the like, should be set forth under this heading.

(4) Work record and any aggravating or mitigating factors--Under this heading should be reported pertinent comments regarding the general work performance record of the employee. In addition, any other factors of an aggravating nature or which might have a mitigating or balancing effect upon the dereliction should be set forth. For example, if an employee put a great deal of hard work and effort into a matter and was also responsible for certain shortcomings, the administrative action finally decided upon would be dependent upon a balancing and weighing of the good and bad aspects. However, any mitigating facts should not be restricted to the particular case or incident from which the dereliction arises. An employee may have performed creditably in other cases recently, on other occasions or displayed a commendable attitude which factors should be brought to FBIHQ's attention.

(5) Comments and conclusions--Under this heading should be set forth the observations of the Bureau official and the conclusions upon which the recommendations for administrative action are based.

(6) Recommendations--Under this heading should be set forth the recommendations as to what, if any, administrative action is necessary.

(7) Enclosures--Attach statements of the complainant, witnesses and employee(s), as well as any documentation relevant to the inquiry.

13-7.2 Investigative Reports (See MIOG, Part 1, 263-7.1.)

(1) Matters involving criminality or serious misconduct supervised/investigated by OPR should, for the most part, be submitted to FBIHQ by Investigative Report which should be thorough, precise and to the point. There may be instances where the extent of the inquiry is so minimal that an Investigative Report would not seem necessary. Any question concerning whether or not to submit an Investigative Report should be resolved by consulting with OPR.

(2) Synopses of OPR Matter Investigative Reports should be extremely complete to include all allegations, the results of investigation and the subject employee's responses to these allegations. Consideration should be given to including a table of contents in these Investigative Reports.

(3) Three copies of the Investigative Report (four copies if the matter involves a substantive case) should be submitted by cover electronic communication (EC), in a sealed envelope, to FBIHQ, Attention: OPR. The cover EC should contain the SAC's observations, comments, mitigating or aggravating circumstances, as well as SAC's recommendations for administrative action.

(4) FBIHQ is to be the office of origin in OPR Matter investigations.

13-8 ALLEGATIONS MADE BY INDIVIDUALS OUTSIDE THE BUREAU

(1) In instances in which allegations are made by persons outside the Bureau against Bureau personnel or the Bureau itself and such charges are disproven, prompt action should be taken to

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refute such claims both with the source of the erroneous complaints and others having knowledge of the allegations, including news media carrying stories on the matter. Where possible, every effort should be made to have the refutation appear in the same article with the charges. Whenever the advisability of taking this action appears questionable, FBIHQ should be advised and a recommendation made on this point setting out clearly the reasons on which the conclusion is based.

(2) If allegations are made against Bureau personnel by subjects of Bureau cases during a court trial, it is the responsibility of the SAC with the concurrence of the USA and/or DOJ, to see that proper refutation is made and that such refutation appears in court records in accordance with the Manual of Investigative Operations and Guidelines, Part II, Section 6. The purpose of this is to insure that in case of an appeal the Bureau's refutation is in the court's record. FBIHQ is to be advised promptly of all pertinent facts and circumstances relating to such allegations and refutations.

13-9 SUSPENSION WITHOUT PAY (See MAOP, Part I, 13-12 (2).)

(1) No Bureau employees are to be suspended without pay without prior FBIHQ approval. Where the seriousness of the situation warrants, the Assistant Director of the Personnel Division may be contacted telephonically. His instructions regarding suspension without pay or other immediate action to be taken pending a final determination of the matter may be secured.

(2) In cases involving disciplinary suspension without pay for seven or more consecutive calendar days, SF-8 will be sent to the employee by Personnel Management Section, FBIHQ, as an enclosure with the letter addressed to employee containing suspension notification. However, when telephonic or teletype instructions are issued by FBIHQ suspending the employee for seven or more consecutive calendar days, instructions will be issued and recorded that SF-8 be furnished.

(3) Employees who are under suspension without pay cannot legally be permitted to work during the period of suspension. If employees offer to work while under suspension, they should be informed it is illegal. FBIHQ decision in such instances is unnecessary, although FBIHQ should be informed of the employee's attitude in making the offer.

(4) Upon return to duty from suspension an SF-52 must be submitted to FBIHQ. The following items must be completed:

- (a) Part A, Items 1, 3, 5, and 6
- (b) Part B, Items 1, 2, 3, and 22

13-10 PROCEDURAL RIGHTS OF PREFERENCE ELIGIBLE EMPLOYEES REGARDING ADVERSE ACTIONS (See MAOP, Part 1, 1-29, 1-30.3, 3-6.1, 8-1.11, 8-1.12.2, 10-6, 10-7, 13-11(2), 13-13, 14-4.1 & 14-4.2.)

(1) A "preference eligible" employee who has completed one year of current continuous service in the same or similar positions within an agency may have certain rights when an adverse action is proposed or taken against the employee. For the purposes of this manual, an "adverse action" involves removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less. Such an action may only be taken for such cause as will promote the efficiency of the service. (See Title 5, United States Code (USC), Sections 7511-7513.) (See MAOP, Part 1, 21-1.)

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(2) As a general matter, a preference eligible employee includes an honorably discharged veteran who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized; during the period beginning on April 28, 1952 and ending on July 1, 1955; or for at least 180 days during a period occurring after January 31, 1955 and before October 15, 1976 (with exceptions applying to the National Guard and the Reserves). The term also includes certain disabled veterans. In addition, under certain limited circumstances "preference eligible" can include an unmarried widow/widower of a veteran, the spouse of a disabled veteran, or the mother of a deceased or disabled veteran. It does not include members of the FBI-DEA Senior Executive Service. (See Title 5, USC, Section 2108.)

(3) With respect to adverse actions, the procedural rights of a preference eligible employee who has completed one year of current continuous service are set forth at Title 5, USC, Section 7513. These rights include: (a) at least 30 days' advance written notice stating the specific reasons for the proposed action, unless there is a reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed; (b) a reasonable time of not less than seven days to answer orally and in writing and to furnish affidavits and other documentary evidence; (c) the right to be represented by an attorney or other representative; (d) a written decision which includes the specific reasons for the agency action; (e) the right to appeal the adverse action to the Merit Systems Protection Board (MSPB); and, (f) the right to inspect documents which the agency relied upon in arriving at its decision. As a general matter, appeals to the MSPB by preference eligible employees are to be filed within 30 days after the effective date of the adverse action.

(4) During the period of advance written notice, the employee may be retained on active duty, be placed on administrative leave, be placed on annual leave or leave without pay with the employee's consent, or be suspended without pay if the suspension does not exceed 14 days in length.

(5) Like nonpreference eligible employees, a preference eligible employee who has completed his/her one-year probationary period (see MAOP, Part 1, Section 21) may appeal an adverse action to the Assistant Director, Administrative Services Division, FBIHQ.

(6) Any necessary notices to preference eligible employees will be handled by FBIHQ.

(7) Upon receiving an employee's reply to the notice of proposed disciplinary action, FBIHQ will consider the reply and advise the employee in writing of the final decision.

(8) A nonpreference eligible employee in an "excepted service" agency such as the FBI is not LEGALLY entitled to the same procedural rights afforded to a preference eligible employee in adverse action cases.

13-11 USE OF AN INDEFINITE SUSPENSION IN PERSONNEL MATTERS (See MAOP, Part I, 1-29.)

(1) Indefinite suspensions are defined by the FBI as the placing of an employee in a temporary status without duties and pay pending investigation, inquiry, or further agency action. The indefinite suspension continues for an indeterminate period of time and ends with the occurrence of the pending conditions set forth in the notice of action which may include the completion of any subsequent administrative action. An indefinite suspension may be imposed when it is determined that an employee's continued presence in the workplace will be injurious to the employee, to co-

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workers or the public, to the FBI's operations, or to national security interests pending additional investigation into the underlying conduct of the employee. Members of the FBI's Senior Executive Service (SES) are not covered by this policy. Rather, indefinite suspensions involving members of the FBI's SES are governed by the adverse action provisions set forth in the FBI's SES policy.

(2) An indefinite suspension for more than 14 days is considered an adverse action under 5 CFR, 752.401(a)(2). Preference eligible employees are, therefore, afforded statutory entitlements which are set forth in Title 5, USC, Section 7513 and MAOP, Part I, 13-10.

(3) See MAOP, Part I, 1-29 for further information concerning the use of an indefinite suspension in matters involving revocation of a security clearance.

13-11.1 Use of an Indefinite Suspension in Matters Involving Criminal Conduct

(1) Each incident involving suspected criminal conduct will be considered from the viewpoint of whether the employee's continued presence in the workplace is detrimental to the FBI in accomplishing its mission. Should the Office of Professional Responsibility (OPR) find that reasonable cause exists to believe an employee has committed a crime for which a sentence of imprisonment may be imposed, a letter signed by the Assistant Director, OPR, will be prepared advising the employee that he/she will be placed on indefinite suspension (without pay or duties) and the reason for such action. Reasonable cause may be established, for example, by an indictment, arrest, the filing of criminal information, credible news reports of egregious acts that are detrimental to the Bureau's mission, such as murder or national security offenses, or through a judicial determination of probable cause. A warrantless arrest alone may not be sufficient to establish reasonable cause. Separate action may be taken to suspend the employee's security clearance in connection with a criminal case. In these types of criminal conduct cases, employees will not be given the option of using leave. (See MAOP, Part 1, 1-29.)

(2) An indefinite suspension for more than 14 days is considered an adverse action under Title 5, United States Code (USC), Section 7512 and Title 5, Code of Federal Regulations (CFR), Part 752.401(a)(2). When an adverse action is proposed or taken against a preference eligible employee, i.e., certain veterans or the spouses, widows, or mothers of veterans who meet the definition of "preference eligible" in Title 5, USC, Section 2108, specific statutory rights apply. Information regarding these rights will be contained in the letter advising the employee of the proposed indefinite suspension.

Since federal law requires that a preference eligible employee continue to be paid during the advance notice period even if required to be absent from the work place, any preference eligible employee receiving a letter proposing his/her indefinite suspension will remain on administrative leave with pay until a final decision regarding placing the employee on indefinite suspension is made and communicated, in writing, to the employee.

(3) Nonpreference eligible employees do not have the additional rights granted to preference eligible employees. Accordingly, an indefinite suspension is effective upon receipt of the written notice of such, and no appeal rights are afforded.

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13-11.2 Other Sources of Compensation During Period of Indefinite Suspension

(1) During periods of indefinite suspension, an employee may request approval for outside employment following established Bureau procedures, which include review to determine whether the proposed outside employment presents a conflict of interest. For a field support employee, an outside employment request should be submitted through the security officer in the field office where located. For an FBIHQ support employee, an outside employment request should be submitted to the Reinvestigation Unit, Security Division. For a Special Agent, an outside employment request should be submitted through the Employee Benefits Unit, ASD. Form FD-331 should be used for such purposes. Review will be expedited upon the employee's request.

(2) The written notice of indefinite suspension will include instructions to the office to provide the employee a copy of Standard Form 8, Unemployment Compensation for Federal Employees Program; Notice to Federal Employees About Unemployment Compensation. For additional information on this topic, employees must contact their state or local unemployment compensation office.

13-11.3 Removal From Indefinite Suspension

An indefinite suspension will be terminated upon completion of the FBI's inquiry and decision concerning the status of the employee (i.e., a decision to fully or partially allow the employee to return to the work place or to terminate employment with the FBI).

13-11.4 Back Pay Matters

If investigative results determine that an employee is to be restored to full duty, the employee is immediately eligible to return to a paid status. In each such case, the Assistant Director, ASD, will cause a review of the circumstances to determine whether back pay may be appropriate for the period of indefinite suspension and make decisions on a case-by-case basis. In addition, when an employee's return to duty is delayed, back pay may be afforded from the time the decision to allow the return to work and the actual return to work date. Such cases are reviewed on their merits and decisions regarding pay and placement are made accordingly.

13-12 RESIGNATION TENDERED DURING PERSONNEL ACTION INQUIRY (FORMERLY 13-11) (See MAOP, Part I, 17-1.1.)

(1) It may be that an employee would rather submit his/her resignation than see the inquiry continue and face possible charges. Division heads, SACs and other supervisory employees may, upon conclusion of their findings, discuss with the employee what the intended recommendation to FBIHQ will be with respect to administrative action, being careful to point out at the same time that any formal action or charges will be made at FBIHQ. Accordingly, it is permissible to discuss the possibility of resignation with the employee. Duress, deception, intimidation or anything similar will not be tolerated and must not be used to influence employee's decision nor may employee be denied adequate time, if requested, to make a decision between resigning or seeing the inquiry continued. Employee should be advised of the Bureau's procedures for employee discipline and that these procedures allow an employee the opportunity to rebut negative allegations and recommendations of his/her supervisors. Employee should also be advised that a voluntary

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resignation might preclude him/her from receiving unemployment compensation he/she may otherwise be entitled to.

(2) Should an employee involved in allegations submit his or her resignation from the Bureau's service, such resignation should be received and forwarded to FBIHQ.

13-13 SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES FOR FBI EMPLOYEES (FORMERLY 13-12) (See MAOP, Part 1, 1-30.3 and 21-7 (4).)

(1) This schedule is to be used only as a guide in determining appropriate discipline based on the violation of regulations by Bureau employees. This schedule is not all inclusive, and final determination of the appropriate disciplinary action warranted in each case will be made by FBIHQ, except for those matters delegated to SACs and Assistant Directors (see 13-2(4) of this section for details). It should be noted that the decision-making process utilized in determining appropriate action in disciplinary matters is extensive in nature and involves input from every level of management in FBIHQ. In addition, consideration is given to Bureau policy and similar incidents previously resolved, as well as any aggravating or mitigating circumstances of the case in point. In some instances, discussions are held with the Department of Justice and the Office of Personnel Management before a final determination is made. In most instances, penalties for violations of regulations will fall within the range of penalties set forth in this schedule. In aggravated case, a penalty outside the range of penalties may be imposed. For example, supervisors and Bureau officials, because of their responsibility to demonstrate exemplary behavior, may be subject to a greater penalty than is provided in the range of penalties. The purpose of this schedule is not to remove the personnel management decisions made in all disciplinary matters but rather to provide an example and guide which is used at FBIHQ and in the field in connection with decisions made in regard to disciplinary matters.

(2) In regard to suspensions, it is noted that the Civil Service Reform Act (CSRA) of 1978 provides that days of suspension will be computed in terms of calendar days, not days worked. Therefore, recommendations for a period of suspension will only be made in terms of calendar days. A period of suspension will always commence at the close of business, Friday of any given week. For example, recommendation of seven (7) days' suspension, if approved, will result in a forfeiture of five days' pay whereas a recommendation of fourteen (14) days' suspension will result in a forfeiture of ten days' pay. A period of suspension in excess of 14 calendar days is an adverse action as defined in the CSRA of 1978 (see 13-10 of this section for details).

(3) A non-SES employee desiring to appeal any suspension from duty without pay and/or an adverse disciplinary sanction will be required to file an appeal stating the grounds relied upon in writing. Only employees who have completed the one-year (two years for Special Agents and forensic examiners) probationary period required by the FBI will be entitled to an appeal. This appeal must be filed within 30 days following notification of the disciplinary action to the employee. The Deputy Assistant Director (DAD), Inspection Division (INSD), will serve as the primary official responsible for the appellate review of disciplinary matters which have involved a non-SES employee's suspension from duty without pay for a period of 14 days or less (called a nonadverse action), unless that disciplinary sanction was issued by the AD, OPR. Whenever the AD, OPR, serves as the deciding official in the suspension of a non-SES employee in a nonadverse

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action, the AD, INSD, will serve as the deciding appellate official. The decision of the AD or DAD, INSD, in such matters will constitute the final authority within the FBI for appellate review.

When a matter under appeal involves a suspension of more than 14 days, demotion or dismissal of a non-SES employee (called an adverse action), the AD, INSD, will establish a Disciplinary Review Board (DRB) to review the action taken by OPR.

When disciplinary action is taken against SES members or ASACs, the Deputy Director is the action authority. The Director is the final appeal authority for disciplinary actions taken by the Deputy Director. Thereafter, nonpreference eligible FBI employees in the excepted service do NOT have a right to appeal a disciplinary action to the Merit Systems Protection Board (MSPB). A "preference eligible" employee who has completed one year of current continuous service in the same or similar positions in an agency, in addition to being able to appeal a disciplinary action as indicated above, may also appeal an "adverse action" (e.g., removal, suspension for more than 14 days, reduction in grade or pay) to the MSPB. As a general matter, appeals to the MSPB by preference eligible employees are to be filed within 30 days after the effective date of the adverse action. (See MAOP, Part 1, 13-2, 13-10, 14-4.1 and 14-4.2.)

(4) COMPOSITION OF A DISCIPLINARY REVIEW BOARD

(a) A DRB will be composed of three voting members, each of whom is a member of the FBI's Senior Executive Service (SES). After designation as members of a DRB, employees will be instructed to refrain from acquainting themselves with any facts or circumstances involving the subject of the appeal, except to review the record of the case.

(b) The DRB will be chaired by the AD, INSD, whenever the disciplinary sanction was imposed by the AD, OPR. In instances in which the disciplinary action under appeal is decided by the DAD, OPR, at the discretion of the AD, INSD, the Board may be chaired by the DAD, INSD.

(c) A non-SES employee who appeals a suspension of more than 14 days, demotion or dismissal will be permitted to select one member of the DRB from a list of all FBI SES participants except those serving at SES level 6, and those who, due to the nature or geographical location of their assignments, have been determined to pose conflicts with the objective and expeditious character of DRB proceedings. This list will be forwarded by the INSD to the employee's division head, and made available for the employee's review, upon request, by the division head or his/her designee (e.g., the Chief Division Counsel), who will then report the employee's selection to the INSD. The third member of the DRB will be selected randomly from the same list. After serving on the DRB, this third member will be removed from the pool of SES participants eligible for random selection (but not employee selection) for DRBs for the remainder of the fiscal year.

(d) An SES member who serves (or last served, in the case of a dismissal) as an employee's rating or reviewing official will not be permitted to serve as a member of a DRB which decides that individual's appeal of an adverse disciplinary sanction.

(e) If, after selection, a member of a DRB feels constrained to disqualify himself/herself, a replacement will be chosen in the same manner the disqualified member was selected.

(5) INSD AND DRB AUTHORITY AND PROCEDURES

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(a) INSD, in an appeal from a suspension of 14 days or less, and a DRB, in an appeal of a suspension of more than 14 days, demotion or dismissal, will review the issues presented in writing by the employee. The review will be of the employee's written appeal, any response submitted by OPR, and any documentary record. If the record of a disciplinary action taken under the auspices of OPR is insufficient to decide the merits of an appeal, INSD or the DRB may remand the case to OPR and direct such additional investigation and findings as may be necessary. Nothing shall preclude INSD or a DRB from requiring an oral presentation if considered helpful to a resolution of the appeal.

(b) An appeal of a suspension of 14 days or less will be decided by the designated INSD official. The decision of a DRB in an appeal of a suspension of more than 14 days, demotion or dismissal will be by majority vote.

(c) In exercising appellate authority, INSD and a DRB may independently redetermine the factual findings and/or the penalty imposed. However, in the event that a different disciplinary sanction is determined to be appropriate, that sanction must be consistent with applicable disciplinary precedent.

(d) After reaching a decision in the review of an appeal, INSD or a DRB will document its findings in writing and provide the employee a written decision.

(e) If INSD or a DRB finds that an employee has not received the procedural protections in the disciplinary process to which he/she is entitled, it may retain the matter for decision, e.g., when the matter involves harmless error, may refer the matter back to OPR for corrective action; or may reverse or modify the action of the deciding official.

(f) The decision of INSD or of a DRB concerning the merits of an appeal involving a non-SES employee will constitute the final decision of the FBI concerning the appropriateness of the disciplinary sanction in the matter under appeal.

(g) Decisions by the INSD or a DRB in the appeal of disciplinary sanctions will be implemented no later than 60 calendar days after the appellate decision is rendered in writing.

These procedures will not apply to matters involving an appeal of an adverse disciplinary action resulting from an employee's loss of a security clearance.

The expansion of procedural entitlements in the appeal of disciplinary actions will not include the right of appeal to the MSPB. The statutory right to appeal an adverse disciplinary action to the MSPB is preserved for preference eligible employees. Existing policies governing indefinite suspensions, administrative leave actions, fitness for duty determinations and nonadverse actions will not be affected by this expansion of appellate procedures.

(6) The following definitions are furnished for information. This schedule does not include discipline required by law or infractions which, in addition to being a violation of Bureau rules and regulations, are also a criminal offense.

(a) Oral reprimand--Employees are advised of deficiency or infraction of regulations and notation made in personnel file relating to the need for the official reprimand.

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(b) Commented upon in annual performance rating--In this instance, the infraction warranted more than an oral reprimand but is not considered severe enough for official recognition in the form of a letter of censure. This refers to work-related matters only.

(c) Censure--Official written reprimand.

(d) Censure and probation--Official written reprimand which includes a minimum probationary period of 90 days for Special Agents and 60 days for other employees.

(e) Censure, probation and suspension--Official written reprimand which, in addition to a probationary period, includes a period of time in which the employee is removed from duty without pay.

(f) Demotion--Any reduction in grade or pay.

(g) Removal--Dropped from the rolls of the FBI.

(7) The standards by which all employees are held are set forth in greater detail in this manual. For further reference, these standards of conduct can be found in the Department of Justice Order 350-65 captioned "Standards of Conduct," Executive Order 12764, and the ETHICS HANDBOOK which is distributed to all personnel.

(8) An employee may be censured when the cause for administrative action is sufficiently aggravated as to require a written reprimand. At the time FBIHQ makes a promotional decision, all relevant information including the cause for a disciplinary matter, including probation, is considered. FBIHQ expects the employee's superior to provide a strong favorable recommendation when the employee has been the subject of disciplinary action within the preceding 12 months. Lacking such a recommendation, FBIHQ may determine that a promotion from one GS or Wage level to another should be delayed for a period of up to 60 days for support employees or up to 90 days for Agents. (See MAOP, Part 1, 3-1.2.2 (3) & (4).)

SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES FOR FBI EMPLOYEES

1. Unexcused or unauthorized absence of 8 hours or less

Applies to: All Personnel

First Offense - Oral Reprimand to 3-day suspension

Second Offense - Oral Reprimand to 5-day suspension

Third Offense - Oral Reprimand to removal

2. Excessive unauthorized absence (in excess of 8 hours)

Applies to: All Personnel

First Offense - Oral Reprimand to 5-day suspension

Second Offense - Oral Reprimand to 15-day suspension

Third Offense - Oral Reprimand to removal

3. Work deficiencies and/or inattention to duty (See MAOP, Part 1, 8-1.11.)

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Applies to: Agent Personnel

First Offense - Oral reprimand to removal

Second Offense - 5-day suspension to removal

Third Offense - 15-day suspension to removal

Applies to: Non-Agent Personnel (Excluding Fingerprint Examiners, Information Services Section, Criminal Justice Information Services Division, for whom standards of production and accuracy, as well as minimum penalties, have been established.)

First Offense - Oral reprimand to removal

Second Offense - 3-day suspension to removal

Third Offense - 5-day suspension to removal

4. Insubordination (See MAOP, Part 1, 8-1.11.)

Applies: All Personnel

First Offense - Censure to removal

Second Offense - 5-day suspension to removal

Third Offense - 15-day suspension to removal

5. Unauthorized possession of, use of, or loss or damage to government property other than motor vehicle or aircraft

Applies to: All Personnel

First Offense - No action to removal

Second Offense - Oral reprimand to removal

Third Offense - Censure to removal

6. *Unauthorized possession of, use of, loss of or damage to government-owned or -leased motor vehicle or aircraft**

Applies to: All personnel

First Offense - Oral reprimand to removal

Second Offense - 3-day suspension to removal

Third Offense - 5-day suspension to removal

***Title 31, U.S. Code, Section 1349(b), provides a minimum of 30 days' suspension for employee who willfully uses or authorizes the use of any government-owned or -leased motor vehicle or aircraft for other than official purposes. (See MAOP, Part 1, 1-3.1.)

7. Traffic violations

Applies to: All personnel

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a. Aggravated (all types)

First Offense - Oral reprimand to removal

Second Offense - Oral reprimand to removal

Third Offense - Oral reprimand to removal

b. Driving Under the Influence or While Intoxicated (See MAOP, Part 1, 1-30.3 and 8-1.12.2.)

First Offense - 30-day suspension to removal

Second Offense - Removal

8. Illegal use of controlled substance (drugs and marijuana)

Applies to: All personnel

First Offense - Censure to Removal

Second Offense - Removal

9. Criminal, dishonest, immoral, infamous or notoriously disgraceful conduct

Applies to: All personnel

First Offense - Oral reprimand to removal

Second Offense - 5-day suspension to removal

Third Offense - 30-day suspension to removal

10. Failure to honor confirmed financial obligations

Applies to: All personnel

First Offense - Oral reprimand

Second Offense - Oral reprimand

Third Offense - Oral reprimand to removal

11. Unauthorized disclosure of information from Bureau records

Applies to: All personnel

First Offense - Oral reprimand to removal

Second Offense - Removal

12. Falsification of official documents and/or records

Applies to: All personnel

First Offense - Oral reprimand to removal

Second Offense - Removal

13. Availability

Applies to: All personnel

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First Offense - Oral reprimand to removal

Second Offense - Oral reprimand to removal

Third Offense - Oral reprimand to removal

14. Fitness for duty (overweight)

Applies to: Agent Personnel

First Offense - Oral reprimand

Second Offense - Oral reprimand to 5-day suspension

Third Offense - Oral reprimand to 15-day suspension

15. Smoking regulations (See MAOP, Part 2, 2-1.6.)

Applies to: All personnel

First Offense - Oral reprimand to censure

Second Offense - Oral reprimand to 5-day suspension

Third Offense - Oral reprimand to 14-day suspension

16. Security violations for:

Applies to: All personnel

a. Loss of classified/sensitive information

First Offense - Censure to removal

Second Offense - Suspension to removal

Third Offense - Suspension to removal

b. Mishandling classified/sensitive information by: improper removal, storage (to include unlocked/unsecure safes, vaults, or cabinets), disposal, transporting, reproduction, transmittal, or access

Applies to: All personnel

First Offense - Oral reprimand to removal

Second Offense - Censure to removal

Third Offense - Suspension to removal

c. Computers

Applies to: All personnel

Medium Risk

1. Failure to properly label ADP storage media

2. Unauthorized Software

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3. Unlicensed Software

4. Nonofficial use of FBI computers

5. Introduction of malicious code

First Offense - Oral reprimand to removal

Second Offense - Censure to removal

Third Offense - Suspension to removal

High Risk

1. Misuse of accessor IDs and passwords

2. Improper maintenance

3. Improper equipment and media disposal

4. Failure to maintain proper control of FBI microcomputers and ADP storage media

5. Unauthorized telecommunications

6. Unauthorized access to FBI computers or networks or exceeding authorized codes

First Offense - Censure to removal

Second Offense - Suspension to removal

Third Offense - Suspension to removal

d. Routing of "Top Secret" or SCI information by telelift system, mail-mobile, pneumatic tube, U.S. Postal Service, or other commercial mail service

Applies to: All personnel

First Offense - Oral reprimand to removal

Second Offense - Oral reprimand to removal

Third Offense - Censure to removal

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